

TENNESSEE GENERAL ASSEMBLY
FISCAL REVIEW COMMITTEE



FISCAL NOTE

HB 1528

January 22, 2018

SUMMARY OF BILL: Requires all parties to consent to the interception of a wire, oral, or electronic communication.

ESTIMATED FISCAL IMPACT:

Increase State Expenditures - \$5,600 Incarceration*

Other Fiscal Impact – Passage of the proposed legislation will lead to decreased prosecutions and admissions into state and local jails provided that no additional appropriations are made for additional law enforcement resources. However, such impacts on state and local expenditures cannot be reasonably determined due to multiple unknown factors.

Assumptions:

- Tennessee Code Annotated § 39-13-601(a)(1)(A) prohibits any person from intentionally intercepting or procuring any other person to intercept any wire, oral, or electronic communication.
- Tennessee Code Annotated § 39-13-601(a)(1)(B) prohibits any person from intentionally using any other person to use any electronic, mechanical, or other device to intercept any oral communication when the device is affixed to or transmits a signal through a wire, cable, or other connection used in wire communications.
- Tennessee Code Annotated § 39-13-601(b) provides exceptions to the offense. Tennessee Code Annotated § 39-13-601(b)(5) authorizes the interception of a wire, oral, or electronic communication where the person is not acting under color of law and where one of the parties to the communication has given prior consent to the interception.
- This legislation would require prior consent from all parties to the communication for the exception to apply.
- Two examples of the current exception are:
 - 1) An attorney receives a call from opposing counsel about pending litigation. The attorney receiving the call, as a party to the communication, can record the conversation without notifying opposing counsel.
 - 2) Law enforcement record conversations, using a “wire”, between a confidential informant and suspected criminals. The records are lawful because the

confidential informant is a party to the conversations and consents to recording them.

- Under this legislation, both examples would be illegal without the consent from all parties to the conversations.
- The legislation will impact state incarceration costs and the effectiveness of law enforcement's investigations.
- Statistics from the Department of Correction (DOC) show that there has been an average of 0.1 admissions per year over the last 10 years for illegal wiretapping.
- Passage of the legislation will result in one additional admission every 10 years for illegal wiretapping.
- According to the U.S. Census Bureau, population growth in Tennessee has been 1.12 percent per year for the past 10 years, yielding a projected compound population growth of 11.78 percent over the next 10 years. Population growth will not affect the fiscal impact of this legislation.
- A recidivism discount does not apply, because these are new admissions.
- According to the DOC, the average operating cost per offender per day for calendar year 2018 is \$71.08.
- Illegal wiretapping is a Class D felony. The average time served for a Class D felony is 2.15 years (785.29 days).
- The maximum cost in the tenth year, as required by Tenn. Code Ann. § 9-4-210, is based on one offender every 10 years serving an 2.23 years (785.29 days) for an annualized total of \$5,582 [(\$71.08 x 785.29 days) / 10].
- Using confidential informants to record conversations with suspected criminals is common practice among law enforcement agencies. The legislation will prohibit law enforcement agencies from continuing this practice.
- The Tennessee Bureau of Investigation reports that this legislation would drastically impact their ability to investigate potential criminal offenses. Local law enforcement agencies would also be impacted.
- Requiring consent from all parties to a conversation would impact law enforcement agencies' ability to build a case against criminals and to make arrests.
- Such an impact to law enforcement's closure rates will also impact the ability of district attorneys general to prosecute criminals. Further, the lack of recorded conversations is a lack of evidence for district attorneys to use in trials.
- The cascading affect will ultimately lead to fewer criminal prosecutions and to fewer admissions into state and local jails.
- However, the impact on state and local incarceration costs cannot reasonably be determined due to multiple unknown factors.
- This decrease in prosecutions and admissions could be mitigated with additional law enforcement resources, but additional appropriations by state and local legislative bodies would be required.

**Tennessee Code Annotated § 9-4-210 requires an appropriation from recurring revenues for the estimated operation cost of any law enacted after July 1, 1986 that results in a net increase in periods of imprisonment in state facilities. The amount appropriated shall be based upon the highest cost of the next 10 years.*

CERTIFICATION:

The information contained herein is true and correct to the best of my knowledge.

A handwritten signature in dark ink that reads "Krista M. Lee". The signature is written in a cursive, flowing style.

Krista M. Lee, Executive Director

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